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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of |) | |
| |) | |
| 1998 Biennial Regulatory Review – |) | IB Docket No. 98-148 |
| Reform of the International Settlements |) | |
| Policy and Associated Filing Requirements |) | |
| |) | |
| Regulation of International |) | CC Docket No. 90-337 |
| Accounting Rates |) | |

TO: The Commission

REPLY COMMENTS OF KOKUSAI DENSHIN DENWA CO. LTD.

Kokusai Denshin Denwa Co. Ltd. ("KDD"), by its attorneys, hereby submits these reply comments regarding the FCC's *Notice of Proposed Rulemaking* ("NPRM") released on August 6, 1998 in the above-captioned proceedings. KDD is a Type I carrier in Japan which now provides domestic as well as international telecommunications services. KDD's U.S. affiliate, KDD America, Inc., has obtained Section 214 authority to provide a wide range of services, including facilities-based, switched resale, and non-interconnected private line resale on the U.S.-Japan route.

I. THE FCC SHOULD REMOVE THE INTERNATIONAL SETTLEMENTS POLICY ON ROUTES WHERE INTERNATIONAL SIMPLE RESALE IS AUTHORIZED OR WHERE THE FOREIGN CARRIER LACKS MARKET POWER

KDD agrees with the numerous commenting parties who support the FCC's proposal to remove its International Settlements Policy ("ISP") on routes involving World Trade Organization ("WTO") member countries where the FCC has authorized international simple

resale (“ISR”)¹ or where the foreign carrier lacks market power at the foreign end.² Removing the ISP in these circumstances will promote the development of competition in the international telecommunications marketplace. Given the rapid opening of competitive markets in numerous WTO member countries, KDD submits that the FCC’s proposals are actually rather conservative. In Japan and other countries, there is no formal international settlements policy today on any routes with WTO member countries. Canada recently rejected a formal settlements policy for both WTO and non-WTO routes. The experience of these countries shows that the ISP is not needed to protect the public interest. Therefore, in addition to supporting the FCC’s proposals as a sound first step for deregulating the U.S. international market, KDD urges the FCC to consider a broader removal of the ISP to ensure that regulations do not unduly impede market forces.

A. Removing the ISP on ISR Routes.

The FCC should adopt its proposal to remove the ISP on WTO routes where ISR is authorized under the FCC’s policies. The FCC authorizes ISR only on routes where the FCC determines that the foreign country offers “equivalent” opportunities to U.S. carriers, or where at least 50% of settled traffic is settled at or below the FCC’s benchmark settlement rates.³ Under

¹ See, e.g., Bell Atlantic/Nynex Comments at 3; BellSouth Comments at 2; BTNA Comments at 7-8; C&W Comments at 4-6; CompTel Comments at 6-7; Deutsche Telekom Comments at 4-5; France Telecom Comments at 1-2; GTE Comments at 4-9; Level 3 Comments at 2; ntt.com Comments at 5-6; PrimeTEC Comments at 6; Qwest Comments at 4-5; RSL Comments at 3; SBC Comments at 8-9, 9-11; Telefonica Comments at 4; Telegroup Comments at 4; Telia North America Comments at 5.

² See, e.g., Americatel Comments at 1; AT&T Comments at 2-3, 4-5; Bell Atlantic/Nynex Comments at 1-2; BellSouth Comments at 2; BTNA Comments at 2-4; C&W Comments at 7-8; CompTel Comments at 7-8; Deutsche Telekom Comments at 4; France Telecom Comments at 1-2; GSA Comments at 3-6; GTE Comments at 4-9; Level 3 Comments at 2; MCI WorldCom Comments at 2; ntt.com Comments at 6; Qwest Comments at 2-3; RSL Comments at 3; SBC Comments at 7-8, 9-11; Sprint Comments at 3-6; TRA Comments at 3; Telefonica Comments at 3; Teleglobe Comments at 2-5; Telegroup Comments at 1; Telia North America Comments at 4-5.

³ See 47 C.F.R. § 63.18(e)(4).

either criterion, the FCC has effectively limited ISR to routes characterized by liberalized market conditions at the foreign end. When both ends of a route are subject to such conditions, the ISP may cause harm by limiting the types of competitive traffic exchange and routing agreements that U.S. and foreign carriers can negotiate. Certainly, ISR routes present no realistic threat of whipsawing, which is the reason why the FCC adopted the ISP in the first place.

KDD opposes several parties' suggestions that the FCC remove the ISP on ISR routes only where the settlement rate is at or near the best practice rate of \$.08/minute.⁴ By design, the best practice rate reflects the settlement rate on U.S. carriers' *lowest-cost* international route.⁵ The FCC has recognized that costs will vary from one route to another,⁶ which means that the best practice rate of \$.08/minute is below-cost for some if not many routes. Further, the best practice rate was not intended to be, and is not, a proxy for determining which routes are liberalized at the foreign end. Rather, the FCC adopted the best practice rate as an enforcement measure in cases where the FCC finds that a foreign-affiliated U.S. carrier has caused a market distortion through below-cost pricing.⁷ It is not appropriate to make such an enforcement mechanism the policy criterion for determining when the ISP is no longer needed on a route.

The best practice rate also fails to take into account the circumstances faced by foreign carriers who must pay interconnection fees to local carriers for the termination of international calls. In particular, the actual interconnection charges paid by international carriers vary significantly from one country to another. Even within the same country, interconnection

⁴ See, e.g., AT&T Comments at 3-4; MCI WorldCom Comments at 6-7.

⁵ *International Settlement Rates*, 12 FCC Rcd 19806, ¶117 (1997).

⁶ *Id.*, ¶¶132-35.

⁷ *Id.*, ¶¶ 132-34, 224.

charges may vary based upon the type of termination (e.g., higher costs to terminate calls on mobile networks). In these circumstances, it would be unreasonable to require compliance with the best practice rate as a prerequisite for removing the ISP.

Lastly, KDD opposes AT&T's position that the FCC should retain the ISP on an ISR route unless the FCC first determines that ISR is commercially viable at the foreign end.⁸ The FCC should reject AT&T's proposal because it would require the FCC to conduct an in-depth review of foreign market conditions. As the FCC learned in applying the so-called effective competitive opportunities test, those inquiries are difficult, burdensome and time-consuming, and require the evaluation of extensive data which may not be readily available to the FCC. Further, such inquiries are not consistent with the new international treaty regime under the WTO Basic Telecommunications Agreement. Indeed, in adopting rules to implement that agreement, the FCC rejected conducting in-depth reviews of market conditions in the foreign country when reviewing the Section 214 applications of foreign-affiliated U.S. carriers.⁹ The FCC should do the same here by rejecting AT&T's proposal that the FCC assess the commercial viability of ISR in a foreign country before removing the ISP on the route.

B. Removing the ISP for Non-Dominant Foreign Carriers.

There is a consensus among commenting parties that the FCC should remove the ISP for arrangements between U.S. carriers and foreign carriers in WTO member countries who lack market power. Without market power, a foreign carrier cannot engage in whipsawing or any other conduct detrimental to the U.S. public interest.

⁸ AT&T Comments at 4, 10, 11-15.

⁹ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, 12 FCC Rcd 23891, ¶¶ 9, 29, 56 (1997) ("WTO Order").

In order to apply this policy, the FCC must be able to distinguish between foreign carriers who possess market power and those who do not. The FCC proposed to use the same presumption that it adopted for its dominant carrier safeguards – namely, a foreign carrier will be presumed to possess market power if its market share exceeds 50% for the international, intercity, or local market segments.¹⁰ KDD hereby reiterates its proposal, which it first presented to the FCC in a still-pending petition for reconsideration in IB Docket Nos. 97-142 and 95-22,¹¹ that the FCC modify its market power presumption to reflect more accurately the circumstances under which foreign carriers lack market power.

The *KDD Petition* showed that the FCC's proposed test would classify certain foreign carriers as presumptively dominant when there is no significant likelihood that such carriers possess foreign market power. In particular, KDD noted that a foreign carrier in a WTO member country may possess a market share greater than 50% over international services, yet clearly lack market power because it does not control monopoly local exchange facilities and faces competition from multiple facilities-based international carriers.¹² In establishing its market power presumption, the FCC stated that "[a]ny presumption should only identify a category of foreign carriers that, as a general matter, lack the ability to leverage foreign market power into the U.S. market."¹³ Therefore, the FCC should adopt KDD's proposal to establish a rebuttable presumption that a foreign carrier lacks market power if (i) it does not control bottleneck local exchange facilities in the foreign country; (ii) it is subject to competition from

¹⁰ *NPRM* at ¶ 22.

¹¹ *See* Petition for Reconsideration of Kokusai Den shin Denwa Co. Ltd., IB Docket Nos. 97-142 & 95-22, filed Jan. 8, 1998 ("*KDD Petition*"). KDD hereby incorporates the *KDD Petition* and related filings in IB Docket Nos. 97-142 and 95-22 into the record in this proceeding.

¹² *KDD Petition* at 6-9.

multiple facilities-based carriers that possess the ability to terminate international traffic and serve customers in the foreign market; and (iii) the carrier is from a WTO member country.

Adopting a modified market power presumption, as proposed by KDD, is fully consistent with the FCC's policies and past decisions. In its rules implementing the WTO Agreement, the FCC established a presumption in favor of alternative settlement arrangements with foreign carriers from WTO member countries.¹⁴ The FCC stated that the presumption could not be rebutted if the foreign carrier is "subject to competition in its home market from multiple (more than one) facilities-based carriers that possess the ability to terminate international traffic and serve existing customers in the foreign market."¹⁵ The FCC justified that standard by noting correctly that "the existence of actual competition from multiple facilities-based carriers serves as a good indicator of whether market conditions are conducive to allowing U.S. carriers to enter market-oriented arrangements."¹⁶ The very same "actual competition" supports adopting the market power presumption proposed by KDD.

Similarly, the FCC has recognized that a carrier with an above-50% share of one market segment does not have market power where it competes in a multiple-carrier market segment and does not control bottleneck local exchange facilities. For example, in 1996 the FCC reclassified AT&T as a non-dominant international carrier even though its international market share was well above 50%.¹⁷ The FCC found AT&T's market share did not reflect market

(...continued)

¹³ *WTO Order*, ¶ 160.

¹⁴ *Id.*, ¶ 302.

¹⁵ *Id.*, ¶ 307.

¹⁶ *Id.*

¹⁷ *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, 11 FCC Rcd 17963 (1996), *aff'd on recon.*, CC Docket No. 79-252, FCC 98-253, rel. Oct. 5, 1998.

power because AT&T did not control local exchange facilities while facing multiple competing facilities-based international carriers in an open-entry market environment.¹⁸ As another example, the FCC has recognized several times that there is unlikely to be an international facilities bottleneck (*i.e.*, backhaul and transmission) where there is multiple facilities-based entry.¹⁹ Therefore, the FCC should adopt KDD's proposed modification to the market power test so that it reflects more accurately the circumstances in which foreign carriers have an above-50% share of one market segment but nevertheless do not possess market power.

Lastly, KDD requests that the FCC clarify the method of calculating a foreign carrier's market share. For the international market segment, the FCC stated that market share should be based upon "the percentage of the foreign carrier's foreign-billed minutes or, if unavailable, foreign-billed revenues."²⁰ Because both minutes and revenues are legitimate measures of market share, the FCC should permit the foreign carrier to choose either method to calculate its foreign market share. Further, the Commission should clarify that either calculation method – foreign-billed minutes or revenues – applies to the total sum of facilities-based and resale traffic.

II. THE FCC SHOULD REMOVE OR STREAMLINE FILING REQUIREMENTS TO THE MAXIMUM EXTENT POSSIBLE

KDD agrees with the numerous parties who urged the FCC to remove all public filing requirements with respect to contracts and settlement rates in situations where the FCC

¹⁸ *Id.*, ¶¶37-93.

¹⁹ *In re Application of KPN US Inc.*, 11 CR 579, 1998 FCC LEXIS 489, ¶ 27 (1998); *Merger of MCI Communications Corp. and British Telecommunications plc*, 12 FCC Rcd 15351, ¶140 (1997).

²⁰ *WTO Order*, ¶ 163 n.318.

removes the ISP.²¹ Those requirements are not needed on routes where the ISP has been removed, and would serve only to impede the ability of U.S. and foreign carriers to negotiate arrangements pursuant to market forces. At a minimum, KDD requests that the FCC remove the requirement that parties making settlement rate modification or notification filings provide a copy to other carriers on the same route. The burden imposed by that requirement plainly outweighs any possible justification on routes where the ISP has been removed.

CONCLUSION

For the foregoing reasons, KDD supports the FCC's proposals for removing the ISP, with the modifications contained herein.

Respectfully submitted,

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²¹ Americatel Comments at 1; Ameritech Comments at 2; AT&T Comments at 2-3, 4-5; BellSouth Comments at 2; BTNA Comments at 8-9; C&W Comments at 8-10; CompTel Comments at 8-9; Deutsche Telekom Comments at 4-5; France Telecom Comments at 1-2, 4-5; GTE Comments at 10-11; Level 3 Comments at 4-5; nta.com Comments at 5-6; Qwest Comments at 5-6; RSL Comments at 3; SBC Comments at 7-8, 9-11; TRA Comments at 3-4; Telefonica Comments at 7; Teleglobe Comments at 5.

CERTIFICATE OF SERVICE

I, Marlene Borack, hereby certify that on this 16th day of October, 1998, I caused true and correct copies of the **REPLY COMMENTS OF KOKUSAI DENSHIN DENWA CO. LTD.** to be served via U.S. Mail, postage prepaid, upon those persons listed below.

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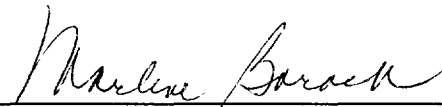
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